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No. 83-2064

In the Supreme Court of the United States

OCTOBER TERM, 1984

T. H. BELL, SECRETARY OF EDUCATION, PETITIONER

v.

STATE OF NEW JERSEY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether, in reviewing an agency audit of federal grant funds expended in 1970-72, a court should apply substantive requirements included in legislation governing federal grants during the period 1978-83 rather than the substantive requirements of the law under which the grants at issue were awarded.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is reported at 724 F.2d 34. The prior opinion of the court of appeals (Pet. App. 6a-31a) is reported at 662 F.2d 208. The decision of the Education Appeal Board (Pet. App. 32a-58a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 60a-61a) was entered on December 27, 1983, and a petition for rehearing was denied on February 17, 1984 (Pet. App. 62a). On May 3, 1984, Justice Brennan extended the time for filing a petition for

a writ of certiorari to and including June 16, 1984. The petition was filed on June 15, 1984, and was granted on October 1, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATION INVOLVED

20 U.S.C. (1976 ed.) 241e(a) provided in pertinent part:

> A local educational agency may receive a grant under this subchapter for any fiscal year only upon application therefor approved by the appropriate State educational agency, upon its determination (consistent with such basic criteria as the Commissioner may establish)—
>
> (1) that payments under this subchapter will be used for * * * programs and projects * * * (A) which are designed to meet the special educational needs of educationally deprived children in school attendance areas having high concentrations of children from low-income families * * *.

20 U.S.C. 2732(a)(1) provides in pertinent part:

> [A] local educational agency shall use funds received under this subchapter in school attendance areas having high concentrations of children from low-income families (hereinafter referred to as "eligible school attendance areas") * * *. A local educational agency may designate any school attendance area in which at least 25 per centum of the children are from low-income families as an eligible school attendance area if the aggregate amount expended under this subchapter and under a State program meeting the requirements of section 2751(c) of this title in that fiscal year in each school attendance area of that agency in which projects assisted under this subchapter

> were carried out in the preceding fiscal year equals or exceeds the amount expended from those sources in that area in such preceding fiscal year.

45 C.F.R. 116.17(d) (1972) provided:

> A school attendance area for either a public elementary or a public secondary school may be designated as a project area if the estimated percentage of children from low-income families residing in that attendance area is as high as the percentage of such children residing in the whole of the school district, or if the estimated number of children from low-income families residing in that attendance area is as large as the average number of such children residing in the several school attendance areas in the school district. In certain cases, the whole of a school district may be regarded as an area having a high concentration of such children and be approved as a project area, but only if there are no wide variances in the concentrations of such children among the several school attendance areas in the school district.

STATEMENT

This case involves expenditures of federal grant funds in Newark, New Jersey in the school years 1970-71 and 1971-72. The statutory and factual background is summarized in this Court's opinion in *Bell* v. *New Jersey*, No. 81-2125 (May 31, 1983), slip op. 1-3.

1. Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. (1976 ed.) 241a *et seq.*, and its successor program, Chapter 1 of the Education Consolidation and Improvement Act of 1981, 20 U.S.C. 3801 *et seq.*, provide federal grants-in-aid to

improve the educational opportunities available to disadvantaged children. "Local educational agencies obtain federal grants through state educational agencies, which in turn obtain grants from the Department of Education upon providing assurances to the Secretary that the local educational agencies will spend the funds only on qualifying programs." *Bell* v. *New Jersey*, slip op. 1-2 (footnotes omitted). The purpose of the programs is to provide special educational services—typically remedial reading and math and English as a second language—to educationally disadvantaged children in low-income areas. H.R. Rep. 95-1137, 95th Cong., 2d Sess. 4, 6 (1978).

One of the principal congressional concerns with the Title I program has been to ensure that federally-funded services reach "areas which have the highest proportions of children from low-income families." S. Rep. 95-856, 95th Cong., 2d Sess. 7 (1978); H.R. Rep. 95-1137, *supra*, at 5. Accordingly, Congress enacted detailed provisions governing both the allocation of federal Title I funds among school districts and the suballocation of those funds among schools and students within each district. Federal funds were allocated among school districts on the basis of the number of low-income children residing in each district, and the state per-pupil expenditure. 20 U.S.C. (1976 ed.) 241c.[1] The local school districts, in turn, were permitted to expend the funds only on behalf of children who were "educationally deprived" —that is, who performed at a level below normal for their age (see 45 C.F.R. 116.1(i) (1972))—and who lived in an area that had a high concentration of

[1] There is no dispute in this case that the Newark school district received its correct allocation of Title I funds.

children from families with incomes below the poverty level. 20 U.S.C. (1976 ed.) 241e(a).

Title I appropriations have never been sufficient to provide services to all eligible students. H.R. Rep. 95-1137, *supra*, at 7. Rather than diffuse the limited funds by providing less than adequate services to all eligible children, the policy of the Act has been to concentrate services on a smaller number of children, serving them more fully. See 20 U.S.C. (1976 ed.) 241e(a)(1)(B) (Title I projects had to be of "sufficient size, scope, and quality to give reasonable promise of substantial progress toward meeting [the special educational] needs" of the children served).

Office of Education[2] regulations in effect in 1970-72 established a comparative test for determining which school attendance areas within a school district were eligible for Title I projects: a school attendance area could receive Title I funds if either the percentage or the number of low-income children residing in the area was at least as high as the district-wide average. Alternatively, the entire school district could be designated as eligible for Title I services, but only if there were little variance in the concentrations of low-income children among school attendance areas within the district. 45 C.F.R. 116.17(d) (1972). Whatever the method chosen, the area designated for Title I services had to "be sufficiently restricted in size in relation to the nature of the project as to avoid jeopardizing its effectiveness in meeting the

[2] Prior to May 4, 1980, the Office of Education of the Department of Health, Education, and Welfare was the federal agency responsible for administration of Title I. After that date, those responsibilities were assumed by the Department of Education. See 20 U.S.C. 3411, 3441.

aims and objectives of the project." 45 C.F.R. 116.17 (c) (1972).

The effect of these regulations was to concentrate the limited Title I funds in the poorest areas of each school district, even though an ineligible area in one of the more disadvantaged districts in a state might well be needier than an eligible area in a wealthier district. For example, a school attendance area in Newark with 32% of its children from families under the poverty line would have been ineligible for Title I services in 1970-72 (since Newark's district-wide percentage was 33.9%); yet an area with that percentage of low-income children might well have been eligible had it been located in other, less disadvantaged, districts in the State.

In subsequent years, the standards for selecting eligible school attendance areas have changed many times. In 1976, the Office of Education modified its regulations to permit school attendance areas with more than 30% of their children from families below the poverty line to be considered eligible for Title I services, under certain conditions, even though the district-wide percentage might exceed 30%. 45 C.F.R. 116a.20(b)(2) (1977).[3] Then, in 1978, Congress lowered this percentage to 25%. At the same time, Congress restricted use of this alternative standard to situations in which the local school district could guarantee that each eligible attendance area receiving Title I services in the preceding year (*i.e.*, those areas with percentages of low-income children at or above the district-wide average that actually had

[3] Attendance areas could be so treated only upon "specific request" by the local school district and approval by the state. 45 C.F.R. 116a.20(a) and (b)(2) (1977).

Title I projects) would continue to receive as much or more state and federal compensatory education funding as the area had received the previous year. 20 U.S.C. 2732(a)(1). In other words, under this "maintenance of effort" proviso, Title I funds could be spread among more areas, where 25% or more of the families were below the poverty line, but only if the resources available to the neediest areas were not thereby reduced. As will be explained in greater detail below, it is this provision that the court of appeals applied retroactively to this case.

In 1981, the Department of Education promulgated a regulation interpreting 20 U.S.C. 2732(a)(1) to permit calculation of the "maintenance of effort" proviso on the basis of per-pupil expenditures rather than aggregates. 34 C.F.R. 201.51(d)(ii) (1981). Later in 1981, Congress passed the Education Consolidation and Improvement Act of 1981, 20 U.S.C. 3801 *et seq.*, which, among many other changes in Title I, superseded the eligibility standards of 20 U.S.C. 2732(a)(1) and replaced them with the following (20 U.S.C. 3805(b)):

> the programs and projects described [in the school district's application to participate in the program must]—
>
> (1)(A) [be] conducted in attendance areas of such [local school district] having the highest concentrations of low-income children;
>
> (B) [be] located in all attendance areas of [a local school district] which has a uniformly high concentration of such children; or
>
> (C) [be] designed to utilize part of the available funds for services which promise to provide significant help for all such children served by such [local school district].

No provision for eligibility of areas with at least 25% concentrations of low-income children (as in the 1978 standards) was included in the 1981 legistion. Department of Education regulations interpreting the 1981 Act also omitted the prior 25% rule. 34 C.F.R. 200.49 (1983).

Finally, in December 1983, Congress amended Chapter 1 to permit school districts to designate any attendance area with at least a 25% concentration of low-income families as a Chapter 1 project. Pub. L. No. 98-211, § 3, 97 Stat. 1413 (to be codified at 20 U.S.C. 3805(d)). Unlike the 1978 Act, however, the 1983 Act did not attach any "maintenance of effort" limitation to this provision. *Ibid.*

2. As a condition to receiving Title I funds for the 1970-72 school years, respondent was required to give assurances that its Title I funds would be spent only for services that satisfied all the applicable requirements, including the school attendance area eligibility standards just discussed. Title I provided (20 U.S.C. (1976 ed.) 241f(a)) that "[a]ny State desiring to participate [in the program] * * * shall submit through its State educational agency * * * an application." The application had to contain "satisfactory assurance" that Title I funds "will be used only for programs and projects which have been approved by the State educational agency * * * and which meet the applicable requirements" of Title I, specifically including the attendance area eligibility standards of Section 241e(a). 20 U.S.C. (1976 ed.) 241f(a)(1). See also 20 U.S.C. (1976 ed.) 241e (requiring local school districts to file applications with state educational agencies, including assurances that they would comply with all applicable Title I requirements).

Title I regulations further specified that state grantees had to provide an assurance that they would "comply with the requirements of Title I of the Act and the regulations in subpart C [which included 45 C.F.R. 116.17(d)]" and that they would require each local school district "to carry out all assurances given by it * * * and * * * perform all obligations imposed on it." 45 C.F.R. 116.31(c) (1972).

3. A federal audit of the New Jersey Title I program for the school years 1970-71, 1971-72, and 1972-73 was completed in 1975. See J.A. 9-51. The auditors concluded that the Newark Board of Education had used Title I funds totalling over $1.1 million in 1970-72 in school attendance areas that did not satisfy the eligibility requirements of the Title I regulations. *Id.* at 14. The auditors also determined that Newark had made proper eligibility determinations for 1972-73. *Id.* at 15.

The principal issue in the audit was the city's method for calculating eligibility of school attendance areas in 1971-72.[4] As explained in the Title I Program Guide No. 44, issued to Chief State School Officers on March 18, 1968 (J.A. 17), a school district could use one of the two methods for calculating the percentage of low-income children in a school attendance area: the district could make its calculations on the basis of children *eligible* to attend the public schools involved, or on the basis of the children actually *attending* those schools, depending on whether the attendance areas had well-defined geographical boundaries. The program guide suggested various sources of income data that could be used—recom-

[4] Because of the statute of limitations, only $1,674 remains at issue from the 1970-71 school year (Pet. App. 36a-37a).

mending especially Aid to Families with Dependent Children and School Lunch Program statistics—but stressed that, whatever data base was used, it had to be used uniformly throughout the district. J.A. 17.

The Newark Board of Education computed a ratio of the total number of AFDC-eligible children enrolled in all schools (elementary, junior, and senior high) within each elementary school attendance area to the enrollment of the elementary school in question. This had the effect of substantially overstating the percentage of low-income children in the school, since the numerator of the ratio included low income children of all ages while the denominator included only children of elementary school age. See J.A. 21-22. Newark used "a different (and also incorrect) method to compute the low-income percentages for the junior and senior high schools . . . by averaging the low-income percentages of the 'feeder or pipe-line' elementary schools" (Pet. App. 45a; see J.A. 23-24). Low-income children were thus double-counted in the calculations for individual school attendance areas at all grade levels; those improperly computed ratios were then compared to a proper calculation of the district-wide percentage of low-income children (33.9%). Pet. App. 42a-45a. In subsequent proceedings before the Education Appeal Board, the State acknowledged (*id.* at 45a):

> The flaw in the initial formula was that it tended to inflate the low-income percentages in attendance areas in that its numerator consisted of all low-income students in an area while its denominator described only elementary school enrollment.

Correcting Newark's calculations, the auditors found that ten elementary and three secondary schools

deemed eligible by the city had in fact been ineligible. The result was that $1,029,630 in Title I funds were improperly spent during the 1971-72 school year. J.A. 25. On June 11, 1976, the Deputy Commissioner for the Bureau of Elementary and Secondary Education issued a final determination letter to respondent demanding repayment of the misspent funds. J.A. 52-58.

Respondent appealed the Deputy Commissioner's determination to the Title I Audit Hearing Board. Respondent contended, inter alia, that the Commissioner (now Secretary) of Education was without authority to compel repayment of Title I funds improperly spent, that under certain recalculations many of the schools deemed ineligible by the audit report were in fact eligible, and that the whole of the Newark district could have been designated as a Title I project area. Respondent did not contend that the city's original computations were correct (Pet. App. 36a, 40a).[5] Nor did respondent contend that the revised eligibility standards adopted by the Office of Education in 1976 (see page 6, *supra*) or by Congress in 1978 (see pages 6-7, *supra*) should be applied to the case, even though both changes were made before the Board heard oral argument on the appeal.

In a decision rendered February 19, 1980, the successor Education Appeal Board rejected each of respondent's arguments (Pet. App. 32a-58a). The Board first concluded that the Commissioner was authorized to compel repayment of misspent funds—a

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[5] Indeed, at oral argument before the Board, respondent stated that the recalculations "are in fact an acknowledgment of the fact that there were irregularities in the original grant approval process" (Pet. App. 46a (citation omitted)).

position ultimately affirmed by this Court in *Bell* v. *New Jersey, supra.* The Board then turned to respondent's proposed recalculations of low-income percentages for the 1971-72 school year. Under these revised calculations, respondent's liability for misspent funds would have been reduced to $18,779 (respondent's calculation) or $342,657 (Deputy Commissioner's calculation). Pet. App. 46a.

While expressing doubts that respondent's post hoc recalculations could properly be considered germane to the appeal,[6] the Board rejected them on the merits. Respondent's proposed revised method of calculation would have compared the total number of low-income children within an attendance area (regardless of age) to the total number of children eligible to attend public school in the attendance area in question (regardless of age). Pet. App. 50a-51a. The Board concluded that this method overstated the low-income percentages for elementary schools because the junior and senior high school cohorts had significantly higher concentrations of low-income children.[7] "By building the junior and senior high school enrollments * * *

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[6] The Board observed (Pet. App. 48a) that Title I "auditors could not conduct an effective audit if the grantees were permitted, years after the funds had been spent, to use new methods for computing attendance area eligibility." In light of its conclusion that the recalculations themselves were substantively improper, however, the Board found it unnecessary to decide whether to reject respondent's argument on this ground. *Id.* at 49a.

[7] The percentage of low-income enrollment for the ten elementary schools in question was 23.8%, while the percentage of low-income enrollment for the junior and senior high schools included in respondent's recalculations were 50.9% and 35.2%, respectively. Pet. App. 52a.

into the ratio," the Board found (*id.* at 53a), "New Jersey inflated the elementary school low-income percentages so that eight of the ten originally disqualified schools became qualified. New Jersey's method of recalculation is unacceptable."

The Board also rejected respondent's contention that "the whole of the Newark school district could have been considered educationally disadvantaged so as to be a Title I area" (Pet. App. 54a (citation omitted)). As noted above, at the time of Newark's application for the 1971-72 school year, Title I regulations provided (45 C.F.R. 116.17(d) (1972)):

> In certain cases, the whole of a school district may be regarded as an area having a high concentration of [children from low-income families] and be approved as a project area, but only if there are no wide variances in the concentrations of such children among the several school attendance areas in the school district.

Respondent contended that Newark would have qualified as a Title I project area under this provision.

The Deputy Commissioner opposed this position, contending: (1) that, since the city had not applied to be treated as eligible under this provision, it was irrelevant whether, had it done so, it might have qualified, and (2) that, since Newark's application showed a very wide variance in low-income percentages, from a high of 84.7% to a low of 10%, it would not have qualified for treatment as a Title I project area under the regulation. Pet. App. 56a-57a. The Board agreed (*id.* at 57a), and accordingly ordered respondent to repay $1,674 for 1970-71 and $1,029,630 for 1971-72 (*id.* at 58a).

The Secretary declined to review the Board's order, which accordingly became final (Pet. App. 59a).

4. Respondent petitioned for judicial review in the United States Court of Appeals for the Third Circuit (J.A. 93), challenging both the Secretary's authority to require recoupment and the validity of the administrative determination that the funds had been misspent. The court of appeals agreed with respondent's argument on the Secretary's recoupment authority and therefore did not consider the alternative claim on the merits (Pet. App. 6a-31a). This Court reversed in a unanimous opinion. *Bell* v. *New Jersey*, *supra*. The Court "conclude[d] that the Secretary has followed the proper procedures. He has administratively determined the amount of the debt owed by [respondent] to the Federal Government * * * as he is empowered to do" (slip op. 18-19). The Court remanded the case to the court of appeals for consideration of respondent's objections to the merits of the Secretary's determination (slip op. 19).

On remand, respondent contended for the first time that its compliance should be tested by the standards contained in the 1978 reauthorization of Title I (see pages 6-7, *supra*), rather than by the standards that were in effect when respondent agreed to comply with them and the funds were furnished.[8] The 1978 standards permitted the use of grant funds in school attendance areas "in which at least 25 per centum

[8] Although the court of appeals acknowledged that appellate courts do not generally consider issues that have not been passed on by the agency or court whose decision is under review, it concluded that an exception to this rule was appropriate here because the issue is one "of national importance, which is singularly within the competence of appellate courts and is not predicated on complex factual determinations" (Pet. App. 3a-4a n.1).

of the children are from low income families * * * if the aggregate amount expended under [Title I] and under a [qualifying] State program * * * in that fiscal year in each school attendance area of that [local school district] in which projects assisted under [Title I] were carried out in the preceding fiscal year equals or exceeds the amount expended from those sources in that area in [the] preceding fiscal year" (20 U.S.C. 2732(a)(1)). Respondent asserted that, if tested by this more lenient standard, most of the 1970-72 Newark expenditures would be allowable.

The court of appeals agreed that the eligibility standards contained in the 1978 reauthorization legislation should be applied to the 1970-72 grant fund expenditures, on the theory that "[a] federal court or administrative agency must 'apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary'" (Pet. App. 4a, quoting *Bradley* v. *Richmond School Board*, 416 U.S. 696, 711 (1974)). Finding no such manifest injustice or contrary statutory indication, the court concluded that retroactive application of the 1978 standards was appropriate, particularly because those changes were assertedly "remedial," and the case "involves a public matter of great national concern * * * [rather than] the routine private lawsuit in which a retrospective application of a law would disadvantage a private party who had relied on a settled body of private law" (Pet. App. 4a-5a). The court accordingly remanded the case to the Secretary to determine, for the disputed school attendance areas, whether the 1970-72 expenditures conformed to the 1978 standards.

SUMMARY OF ARGUMENT

The Title I program was reauthorized in 1978, just as it was again reauthorized, under a different name (Chapter 1 of the Education Consolidation and Improvement Act), in 1981. In each instance, Congress conducted extensive hearings and investigations into the operation of the program and adopted numerous changes designed to make the program achieve its objectives more effectively. The court of appeals, when reviewing an audit of Title I expenditures made in the school years 1970-71 and 1971-72, concluded that one of the 1978 changes in program requirements (a modification in school attendance area eligibility standards) must be applied retroactively to the 1970-72 audits. The court reached this somewhat startling conclusion on the basis of a supposed presumption in favor of retroactive application of statutory amendments, purportedly strengthened in this case by assertions that the 1978 reauthorization legislation was "remedial" in nature and that the case involves "a public matter of great national concern" litigated on appeal by "two public agencies." Pet. App. 4a-5a.

We submit that the court of appeals' retroactivity analysis is fundamentally flawed—indeed, that every relevant consideration points toward a purely prospective application of the 1978 Title I program requirements.

First, the court of appeals disregarded the contractual nature of respondent's assurances in 1970 and 1971 that it would comply with and enforce all Title I program requirements applicable to its grants. Viewed as a contract, it is not remotely plausible to construe the assurances as incorporating future changes in law. Neither respondent nor the federal

government would ever have agreed to allow their legal rights and obligations to fluctuate with subsequent changes in congressional or administrative policy. And the conduct of the parties confirms that their contemporaneous understanding of the Title I grant agreement was that it embodied the program requirements of the day. As Justice White noted in the prior decision in this case, *Bell* v. *New Jersey*, slip op. 2 (concurring opinion), the states have "no legitimate claim" to be able to breach these "contractual-type agreements" with impunity.

Second, the court of appeals virtually ignored clear indications of congressional intent that the 1978 legislation apply only prospectively. The statute itself specified that it would apply to grants beginning in fiscal year 1978. Canons of construction applied by the Comptroller General, statements in the legislative history, and the general savings clause, 1 U.S.C. 109, all confirm this understanding.

Third, the court of appeals misunderstood the correct retroactivity presumption applicable to substantive legislation of this sort. The court purportedly relied on language in *Bradley* v. *Richmond School Board*, 416 U.S. 696 (1974), but failed to honor the exceptions and limitations discussed in that opinion and reflected in numerous decisions by this Court. In the absence of unambiguous indications of congressional intent, statutes affecting substantive rights or obligations are considered prospective only. This case clearly falls into that category—not into the category of cases involving procedures, remedies, or prospective relief, where this Court has treated statutory changes as applying to pending cases.

Fourth, the court of appeals' implicit judgment that it would be bad policy to hold respondent accountable for misspent funds in a case of this nature is contrary to congressional intent, as explored in *Bell* v. *New Jersey*, slip op. 8-16. The judgment below would have a devastating effect on the federal government's ability to enforce the terms and conditions attached to federal grant programs.

ARGUMENT

IN REVIEWING A DETERMINATION OF AUDIT DEFICIENCIES IN A FEDERAL GRANT PROGRAM, A COURT SHOULD APPLY THE SUBSTANTIVE STANDARDS OF THE LAW UNDER WHICH THE GRANTS WERE MADE

In 1970 and 1971, respondent applied for and received substantial grants of federal funds for the 1970-72 school years, expressly on the condition—solemnized by written assurances—that it would comply with all Title I requirements, including requirements regarding eligibility of school attendance areas. The books for that school year closed, and in due time federal auditors discovered that the Newark School Board had spent approximately $1.1 million to provide services to children in schools that were not eligible for them under the standards then in effect.

In the succeeding years, the standards for determining eligible school attendance areas were modified many times. After remaining unchanged from 1967 through 1976, the standards were modified by the Commissioner of Education in 1976, by Congress in 1978, by the Secretary of Education in 1981, by Congress also that same year, and again by Congress in 1983. The question before the Court is: which standards should auditors and reviewing courts apply in

assessing the legality of respondent's program operations in 1970-72? We submit that they should apply the standards in effect at the time.

A. The Obligations And Conditions Of A Voluntary Contractual Grant Program Between The Federal Government And A Grantee Are Fixed As Of The Time Of The Grant Agreement

Like other federal grant-in-aid programs, Title I was (and Chapter 1 is) based on the concept of "cooperative federalism." See *King* v. *Smith*, 392 U.S. 309, 316 (1968). Participation in the program by the state grantees was purely voluntary, but in choosing to participate, a grantee committed itself to abide by the terms and conditions prescribed by Congress (or, through delegation of authority, by the Secretary or the Commissioner). *Id.* at 316-317. See pages 8-9, *supra* (describing assurances required of respondent). The Title I program was, therefore, "much in the nature of a contract: in return for federal funds, the States agree[d] to comply with federally imposed conditions." *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1, 17 (1981).[9]

Justice White aptly characterized the nature of respondent's legal obligation in his concurring opinion in this Court's prior decision in this case, *Bell* v. *New Jersey*, No. 81-2125 (May 31, 1983), slip op. 2:

> The States enter into contractual-type agreements with the United States to disburse the [Title I] monies in accordance with specified conditions. The States had no legitimate claim to a right to be able to breach these agreements

[9] Although Title I involves only state grantees and local school district sub-grantees, the principles of this case apply equally to any federal grantee, public or private.

with impunity. In the absence of any contrary congressional intent, agreements such as these are surely enforceable.

The question in this case, therefore, is not so much what *law* to apply, but what did the contract between respondent and the federal government in 1970-72 mean.

Viewed as a contract, it is quite obvious that respondent's assurances incorporated the Title I requirements as they existed at the time. Neither respondent nor the federal government could reasonably be thought to have agreed to terms and conditions that would not be enacted until some six years after all activities under the contract had been completed. The legitimacy of Congress's imposition of terms and conditions on the Title I program depended on whether the states could "voluntarily and knowingly accept[] the terms of the 'contract.'" *Pennhurst*, 451 U.S. at 17 (citations omitted). And there could have been no "knowing acceptance" of those terms by respondent if—as would be the case if the commitment referred to future law rather than current law—the State were "unable to ascertain what [was] expected of it." *Ibid.* It is inconceivable that, when respondent and the Commissioner of Education executed this contract in 1970-72, they intended respondent's performance of its obligations to be measured by standards not yet enacted—to be determined by the fortuity of when respondent's petition for review of the Commissioner's determination of deficiencies, if any, might be heard.

Moreover, the plain terms of the State's required assurances and the nature of its obligations preclude any possibility that future legislative changes were expected to apply retroactively. The assurance required under 20 U.S.C. (1976 ed.) 241f(a) stated that the Title I funds would be used only for programs and projects that met the applicable requirements of Section 241e(a), *i.e.*, the attendance area eligibility requirements, among others. The assurance did not state that the programs and projects would meet the requirements of Section 241e(a) *as they might subsequently be amended.*[10] If the parties had intended their rights and obligations under the contract to fluctuate according to future changes in law, they surely would have said so.

By its assurances, respondent also undertook an enforcement responsibility, the duty to screen local applications and oversee local operations to ensure that Title I funds would be used only for programs and projects that satisfied the requirements of Section 241e(a). See 20 U.S.C. (1976 ed.) 241f(a)(1)). The pertinent question now must be whether respondent complied with its commitments as they were understood at that time. It makes nonsense out of those assurances to allow respondent to excuse its failure to enforce compliance with Section 241e(a) on Congress's later decision to amend the law.

The conduct of the parties to the contract also casts light on the contemporaneous understanding of its meaning. If, as respondent now contends, the assurances it provided were understood to incorporate subsequent amendments to the Title I standards, then respondent would have litigated this case on that un-

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[10] Similarly, the assurance under the Title I regulations required that the State comply with the requirements in subpart C of the regulations, which included the specific regulatory provision at issue (45 C.F.R. 116.17(d) (1972))—and not future revisions to those regulations. See 45 C.F.R. 116.31(c) (1972).

derstanding. The standards for determining school attendance area eligibility first changed in September 1976, and according to respondent (see Supp. C.A. Br. 14-15. n.*), under those revised standards, respondent's liability would have dropped from $1.1 million to about $470,000. Yet respondent's application for review of the final audit determination, filed on October 21, 1976 (J.A. 59), relied exclusively on the prior Title I standards; nowhere in its application did respondent suggest that revisions in the standards might have affected its obligations. See page 11, *supra*. Nor did respondent rely on the 1976 regulations in subsequent proceedings before the Board. In 1978, Congress again changed the standards. Under those standards (assuming it otherwise satisfied the statutory criteria), respondent's liability would have fallen to about $248,000 (according to respondent's figures, see Nov. 10, 1983 letter to the clerk of the court of appeals, at 2). Again, however, respondent made no claim at the time that the new standards should apply.

Respondent's current argument is no more than a post hoc rationalization; at the time of the contract and for some ten years thereafter, respondent understood its assurances to refer to the 1970-72 standards. That contemporaneous understanding, which is consistent with the terms of the assurances, with the views of the agency charged with enforcement of the grant conditions, and with common sense, should govern the interpretation of this contract.[11]

[11] Other courts of appeals have consistently analyzed federal grantees' compliance with the terms of their grant agreements by reference to the standards in effect at the time the grants were made. See, *e.g.*, *Indiana* v. *Bell*, 728 F.2d 938, 941 n.6 (7th Cir. 1984) (Title I); *North Carolina Comm'n of Indian Affairs* v. *Dep't of Labor*, 725 F.2d 238, 239 (4th Cir. 1984) (CETA); *Woods* v. *United States*, 724 F.2d 1444, 1446 n.1 (9th Cir. 1984) (Food Stamps); *Kentucky* v. *Secretary of Education*, 717 F.2d 943, 945, 947 n.9 (6th Cir. 1983), cert. granted, No. 83-1798 (Oct. 1, 1984) (Title I); *West Virginia* v. *Secretary of Education*, 667 F.2d 417, 420 (4th Cir. 1981) (Title I).

This is not to say that a subsequent Congress would lack the power to relieve a grantee of the *consequences* of having violated its assurances. Such a course might well make sense if a subsequent Congress believed that the terms and conditions then imposed were unfair.[12] However, neither respondent nor the court of appeals has suggested that 20 U.S.C. 2732(a)(1), or any other statute, is an exercise of this forgiveness power. We will address the meaning of Section 2732(a)(1) in detail below; for present purposes it suffices to note that nothing in the language or legislative history even remotely indicates an intention to interfere with remedies for past violations.

[12] Indeed, the House of Representatives passed a bill that would have required the Secretary to apply the provisions of 20 U.S.C. 2732(a)(1) retroactively to any audit determinations of pre-1978 expenditures now pending. H.R. 11, 98th Cong., 2d Sess. § 808(a)(4) (1984); see 130 Cong. Rec. H7903 (daily ed. July 26, 1984). The provision was deleted from the legislation in conference. See H.R. Rep. 98-1128, 98th Cong., 2d Sess. 53-54 (1984); see 130 Cong. Rec. H10756 (daily ed. Oct. 2, 1984). Had the provision been enacted, the effect would have been to relieve states of the obligation to repay misspent funds. It would not, of course, have had any bearing on whether respondent or other states in fact complied with the assurances they had given in prior years.

B. The 1978 Act, By Its Terms And Legislative History, Was Intended To Be Prospective Only

The question of prospectivity or retroactivity of legislation (constitutional considerations aside) is one of statutory construction. This Court has often addressed the factors to be considered when a statute, together with its legislative history, does not expressly indicate whether it was intended to be applied to conduct that has already taken place. See pages 33-41, *infra*. But "[w]here Congress has expressly provided, or the legislative history had indicated, that legislation was to be given only prospective effect, the courts * * * generally have followed that lead." *Bradley* v. *Richmond School Board*, 416 U.S. 696, 715-716 n.21 (1974). In such a case, there is no call to consult presumptions or canons of construction. Congress has spoken.

The court of appeals was therefore in error when it held that substantive provisions of the 1978 Title I reauthorization legislation were intended to be applied retroactively to govern judicial review of audit determinations concerning grants made pursuant to prior law. The court's statement (Pet. App. 4a) that "nothing in the 1978 amendments or the legislative history indicates that the amendments were not intended to be applied retroactively" is simply unfounded.

The intention of Congress in this regard could hardly be clearer. The 1978 legislation expressly provided (20 U.S.C. 2702) that "[d]uring the period beginning October 1, 1978, and ending September 30, 1983, the Secretary shall, in accordance with the provisions of this sub-chapter, make payments to State educational agencies for grants made on the basis of entitlements created under this sub-chapter."

See also Pub. L. No. 95-561, § 1530, 92 Stat. 2380 (effective date of 1978 Act would be October 1, 1978).[13] The plain meaning of 20 U.S.C. 2702 is that the substantive standards enacted by the 1978 legislation were to apply to grants between October 1, 1978 and September 30, 1983—and not before.[14] Where, as here, Congress has explicitly provided that the substantive provisions of reauthorization legislation are to apply during a specific, prospective period of time, it is patent misconstruction to apply those provisions to an earlier era.

This accords with the general theory of the law of federal grants. The terms and conditions reflected in grant assurances are "strings" attached to particular grants of money, which are themselves strictly limited as to when they can be spent.[15] The assurances thus embody the conditions a Congress chooses to attach to the monies it expends. The allowability of expenditures under a particular grant must depend on the conditions attached by Congress to *that*

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[13] This Court has held that statutes must be read in light of their stated effectiveness date. *White* v. *United States*, 191 U.S. 545, 553 (1903). Cf. *LTV Federal Credit Union* v. *UMIC Government Securities*, 704 F.2d 199, 202 (5th Cir. 1983) (absence of effective date supports finding that legislative intent concerning retroactivity is ambiguous).

[14] Similarly, prior law (20 U.S.C. (1970 ed.) 241b) had provided that "[t]he Commissioner shall, in accordance with the provisions of this subchapter, make payments to State educational agencies for the period beginning July 1, 1965, and ending June 30, 1973." See also 20 U.S.C. (1976 ed.) 241b (intervening period). There is obviously no conflict between these provisions, and no basis for applying the standards expressly enacted for 1978-83 to grants made during the period 1965-73.

[15] Title I funds were available for a two-year period. 20 U.S.C. (1976 ed.) 1225(b).

grant; it is irrelevant whether subsequent Congresses may decide to alter the conditions attached to *other* grants.

Accordingly, the Comptroller General—the federal official charged with determining the legality of actions taken with regard to the use of public funds—has consistently held that changes in appropriation or authorization statutes must be applied prospectively only. They are not to be applied to expenditures made under prior statutes unless the changes are made retrospective by express language or by necessary implication. Office of General Counsel, GAO, *Principles of Federal Appropriations Law* 2-48 (1982); see, *e.g.*, 62 Comp. Gen. 396, 398 (1983); 38 Comp. Gen. 103, 104 (1958); 28 Comp. Gen. 162, 162 (1948); 16 Comp. Gen. 1051, 1054 (1937). In light of Congress's reliance on the Comptroller General for authoritative advice and interpretation of statutes, principles, and procedures in the area of federal expenditures,[16] his views are entitled to considerable weight in determining congressional intent.

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[16] The Comptroller General, whose tenure in office is largely subject to congressional control (31 U.S.C. 703), is generally considered an "arm of the Congress" in addition to being the federal government's chief fiscal supervisor. Among other responsibilities, the Comptroller General "investigates all matters related to the receipt, disbursement, and use of public money" and advises Congress regarding such matters. 31 U.S.C. 712, 717, 719; see generally *Bowsher* v. *Merck & Co.*, 460 U.S. 824 (1983). Specifically, the Comptroller General is required to report to Congress regarding "expenditures * * * an agency makes in violation of law." 31 U.S.C. 719(c)(1). The Comptroller General is also consulted by Congress when it is considering proposed legislation in areas within his expertise. 31 U.S.C. 719(i)(2). Accordingly, Congress is likely to have drafted legislation within the Comptroller General's purview in light of his canons of construction.

The legislative history confirms this prospective interpretation of the statutory language. The 1978 amendments were part of a general reauthorization and revision of the Title I program. The focus of legislative consideration was on how future Title I grants could be simplified, clarified, and improved. See H.R. Rep. 95-1137, 95th Cong., 2d Sess. 2 (1978); 124 Cong. Rec 15935 (1978) (statement of Rep. Chisholm); *id.* at 27533 (statement of Sen. Byrd). The House Report stated that the changed requirements clarify "the manner in which school districts *are to distribute* Title I funds among eligible schools and children," thus explicitly indicating that the changes were understood to apply prospectively. H.R. Rep. 95-1137, *supra*, at 21.

The amendment with which this case is concerned—affecting school attendance area eligibility standards—reflected a change in policy arising from "a concern that inflexible targeting requirements could force some school districts with very high incidences of poverty to declare school[s] with 20 percent low-income enrollment ineligible, while schools with only 10 percent low-income enrollment or less might be eligible in wealthier neighboring districts." H.R. Rep. 95-1137, *supra*, at 22. The problem arose because Title I was not funded at a level adequate to serve all eligible children, and thus some form of allocation among eligible children had to be adopted. The regulation in place from 1967 to 1976, 45 C.F.R. 116.17(d), attempted to deal with the scarcity of resources by requiring each district to confine its Title I projects to the neediest half of its school attendance areas. When viewed from an intradistrict perspective, the effect of the regulation was consistent with the congressional objective of serving "areas

which have the highest proportions of children from low-income families" (S. Rep. 95-856, 95th Cong., 2d Sess. 7 (1978)). Indeed, any other approach would result in shifting limited resources from needier to less needy areas within the district and diluting Title I programs in the schools with the greatest percentages of low-income children. When viewed on a statewide basis, however, there was an anomaly that an attendance area with a given percentage of children from low-income families would have a greater chance of being designated as an eligible area if it were located in a wealthier, rather than a poorer, district.[17]

Thomas C. Schmidt, Rhode Island Commissioner of Education, summarized the problem as follows, in testimony on behalf of the Education Commission of the States:

> Essentially, [the] process requires a [local school district] to determine the district-wide percentage of economically disadvantaged students. Any school which has a higher incidence of economically disadvantaged students is eligible for Title I funds. * * * Within a school district this is a quite rational means of concentrating Title I money. Within a state it is not consonant with the expressed objective of the legislation for the simple reason that the incidence of low-income students varies enormously among [local school districts] in any given state and as a result there

[17] This effect was mitigated somewhat by the fact that a comparatively more disadvantaged district would receive a correspondingly higher per-pupil allotment of Title I funds. See 20 U.S.C. (1976 ed.) 241c. Because of its high poverty rates, the Newark school district received substantial amounts of Title I funds during the period audited. In 1970-73, Newark received over $28,000,000 in Title I funds—over 18% of the State's allocation. J.A. 14.

> are wide variations in target school levels among districts.

Education Amendments of 1977: Hearings on S. 1753 Before the Subcomm. on Education, Arts and Humanities of the Senate Comm. on Human Resources, 95th Cong., 1st Sess. 92 (1977) [hereinafter cited as *Senate Hearings*].

Although several witnesses advocated selection of eligible attendance areas on a statewide basis (a proposal that would have caused a major shift in Title I resources from less disadvantaged to more disadvantaged areas within each state),[18] Congress decided instead to lower the threshold for eligibility from the 30% standard in the 1976 regulations to 25%, subject to certain restrictions explained at pages 6-7, *supra*. As 20 U.S.C. 2702 indicates, the new standard was intended to apply to future grants under the reauthorized Title I program. Not one member of Congress or witness before the congressional committees suggested that this new threshold would or should apply to prior grants.[19]

[18] See, *e.g.*, *Senate Hearings*, 94-95 (testimony that all major state education organizations supported state-wide eligibility determinations); *Part 12: National Organization: Hearings on H.R. 15 Before the Subcomm. on Elementary, Secondary, and Vocational Education of the House Comm. on Education and Labor*, 95th Cong., 1st Sess. 394-395 (1977) (testimony of Ruth Mancuso, Vice President of the National Ass'n of State Boards of Education); *Part 19: Title I—Funds Allocation: Hearings on H.R. 15 Before the Subcomm. on Elementary, Secondary, and Vocational Education of the House Comm. on Education and Labor*, 95th Cong., 1st Sess. 858-859 (1977) (testimony of Caryl Kline, Secretary of the Pennsylvania Dep't of Education).

[19] The Senate Report characterized the 1978 reauthorization legislation as a "complete rewrite" of Title I. S. Rep. 95-856, 95th Cong., 2d Sess. 130 (1978). Although one of the pur-

Indeed, there was explicit recognition that the need for the change had become apparent only after extensive experience with the program. Pennsylvania's Secretary of Education, for example, testified that the prior regulations "made sense in the early years of the title I program." *Part 19: Title I—Funds Allocation: Hearings on H.R. 15 Before the Subcomm. on Elementary, Secondary, and Vocational Education of the House Comm. on Education and Labor*, 95th Cong., 1st Sess. 858-859 (1977) [hereinafter cited as *Part 19: House Hearings*]. See also 124 Cong. Rec. 27528 (1978) (comments of Sen. Kennedy) ("[i]n developing the legislative provisions for Title I, the committee was guided by the wealth of research and evaluative information which is now available concerning the program").

Merely because Congress believed the 1978 amendments would make the Title I program more effective in achieving its objectives does not imply that Congress intended the amendments to apply retroactively. The entire legislative history is consistent with the interpretation that Congress intended to improve the program for the future, not to remake the past.

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poses of the legislation was to "clarify and logically structure the present requirements" (*ibid.*), it cannot be argued that the 1978 Act was intended merely to restate or clarify prior law. In some respects, the 1978 Act added new or more stringent requirements. See, *e.g.*, 20 U.S.C. 2735 (parental involvement); 20 U.S.C. 2738 (complaint resolution). With reference to the change in school attendance area eligibility standards, the legislative history does not suggest that the 1978 provision was a mere clarification of prior law; rather, an independent purpose of the 1978 Act was to "insure systematic methods for the distribution of Title I funds by local educational agencies among project areas" (S. Rep. 95-856, *supra*, at 130).

The court of appeals casually disregarded all of this evidence of congressional intent, stating that the legislative history is "replete with evidence that Congress enacted these amendments to correct the injustice that the earlier ineligibility standards worked on areas with high concentrations of low income families" (Pet. App. 4a). Even if accurate, this portrayal of the legislative history would be no substitute for actual indications that Congress intended the 1978 changes to apply retroactively. As we have discussed, all the direct evidence points the other way. But the portrayal is not accurate. The scant discussion of the issue in the mammoth legislative history of the 1978 Act (one substantive discussion in a House Report; fewer than a dozen references by witnesses in some 25 volumes of hearings) contains not one reference to "injustice" or any synonym thereof.[20] Congress

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[20] The court of appeals cited three passages from the House hearings. Pet. App. 4a n.2. The first, *Part 16: Services and Student Development: Hearings on H.R. 15 Before the Subcomm. on Elementary, Secondary, and Vocational Educational Education of the House Comm. on Education and Labor*, 95th Cong., 1st Sess. 194-197 (1977), was a tabular response to Rep. Quie's request for data on how often school districts used the alternative provisions of the 1976 regulations (see page 6, *supra*). No opinions were expressd. The second, *Part 18: Administration of Title I of ESEA: Hearings on H.R. 15 Before the Subcomm. on Elementary, Secondary, and Vocational Education of the House Comm. on Education and Labor*, 95th Cong., 1st Sess. 134-141 (1977), was testimony by the Superintendent of the Baltimore Public Schools that the formula for distributing funds should "remain essentially the same, * * * in accordance with regulations comparable to those in use over the past several years" (*id.* at 137, 141), but that an additional tier of funding should be provided for major metropolitan areas. The third, *Part 19: House Hearings* 857, was testimony, quoted in part in text at page 30, *supra*, that although the prior school attendance area eligibility

was simply fine-tuning the attendance area eligibility standards.

Any possible doubt regarding the legislative intent in this regard is laid to rest by the general statutory savings clause, 1 U.S.C. 109, which provides that "[t]he repeal of any statute shall not have the effect to release or extinguish any * * * liability incurred under such statute, unless the repealing Act shall expressly so provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such * * * liability."

This statute embodies a congressional policy, binding on the courts, against retrospective application of statutory changes that would impair the government's ability to enforce liabilities—whether civil or criminal—for violations of prior law. It applies to amendments as well as to outright repeals. *Warden* v. *Marrero*, 417 U.S. 653, 660 (1974); *United States* v. *Mechem*, 509 F.2d 1193, 1194 n.3 (10th Cir. 1975); *Moorehead* v. *Hunter*, 198 F.2d 52, 53 (10th Cir. 1952). Moreover, "the term 'liability' as used in the general savings statute has been broadly construed by the courts to comprehend all obligations arising out of any breach of a statutory duty." *NLRB* v. *National Garment Co.*, 166 F.2d 233, 237 & n.4 (8th Cir. 1948) (citing cases). Accord, *Hertz* v. *Woodman*, 218 U.S. 205, 217-218 (1910); see also *United States* v. *Carter*, 171 F.2d 530 (5th Cir. 1948) (ap-

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standards "made sense in the early years of the title I program," they now "impede the program's effectiveness." *Part 19: House Hearings* 859. By no stretch of the imagination could these three brief passages in the hearings be considered evidence that Congress thought the prior standards were an "injustice" that should be changed retroactively.

plying statute to require restitution of overcharges to purchasers of housing under expired statute).[21]

The court of appeals' retroactive application of the 1978 reauthorization of Title I plainly contravenes that congressional policy. Nothing in the 1978 legislation expressly prohibited the continuing applicability of the substantive standards under which the 1970-72 grants were made; the general savings statute thus requires that liabilities incurred under those standards remain enforceable.

C. The Court Of Appeals Erroneously Applied A Presumption In Favor Of Retroactive Application Of The 1978 Standards

The 1978 amendments—both their language and their legislative history—evince a clear intention to apply prospectively, and the general savings clause, 1 U.S.C. 109, further reinforces the congressional judgment to preserve liabilities incurred under prior law. But even if the direct evidence of congressional intent were less clear, the court of appeals still would have erred in indulging a presumption in favor of retroactivity of the type of substantive legislative change at issue here.[22]

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[21] That respondent's liability here arose from its violation of a regulation rather than the Title I statute itself does not affect the applicability of the savings clause. A liability incurred under a valid regulation is, for all legal purposes, "incurred under" (1 U.S.C. 109) the statute; the regulation, no less than the statute, has "legislative effect." See *Batterton* v. *Francis*, 432 U.S. 416, 425 (1977).

[22] The terminology used in this area—"retroactive" (or its synonym, "retrospective") versus "prospective" application of law—is not always used consistently. The classic definition (and that adopted for purposes of this brief) was stated by

In *Bradley* v. *Richmond School Board*, 416 U.S. 696 (1974), this Court reviewed the precedents concerning application of a change in law to cases pending on appeal. Under the circumstances of that case, the Court applied the general principle (*id.* at 711) that:

Justice Story in *Society for the Propagation of the Gospel in Foreign Parts* v. *Wheeler*, 2 Gall. 105, 139 (C.C.D.N.H. 1814):

> [E]very statute, which takes away or impairs vested rights acquired under existing law, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past, must be deemed retrospective.

Accord, 2 C. Sands, *Sutherland's Statutory Construction*, § 41.01, at 245-246 (4th ed. 1973). This understanding holds whether the change in law occurs during the pendency of litigation on the issue (*e.g.*, *Greene* v. *United States*, 376 U.S. 149 (1964); *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801)), or whether the change in law precedes any litigation in the matter (*e.g.*, *United States* v. *Security Industrial Bank*, 459 U.S. 70, 79 (1982); *Union Pac. R.R.* v. *Laramie Stock Yards Co.*, 231 U.S. 190 (1913)). The question is simply whether a new statute is intended to affect the treatment of conduct or transactions completed under prior law.

This question should be differentiated from the related question (frequently faced by this Court) whether a judicial decision that "changes" the law (by reinterpreting it or holding a statute unconstitutional) should be applied "retroactively." See, *e.g.*, *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971); *Linkletter* v. *Walker*, 381 U.S. 618 (1965); *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U.S. 371 (1940). Traditionally, changes in statutory law were viewed as prospective, and changes in decisional law as retrospective. *United States* v. *Security Industrial Bank*, 459 U.S. at 79. Even now, when significant exceptions have been recognized to both general principles, the relevant considerations in the two classes of cases remain distinct.

> a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary.

The Court also stated, however, that its decision did not "hold that courts must always thus apply new laws to pending cases in the absence of clear legislative direction to the contrary" (*id.* at 715), and it expressly reaffirmed precedents such as *Greene* v. *United States*, 376 U.S. 149 (1964), and *Union Pac. R.R.* v. *Laramie Stock Yards Co.*, 231 U.S. 190 (1913), which establish the limits to the general principle. See 416 U.S. at 716-717 & n.24, 720.

Those decisions, at first blush, appear at tension with the general principle enunciated in *Bradley*. In *Greene* and *Laramie Stock Yards*, this Court stated:

> the first rule of construction is that legislation must be considered as addressed to the future, not to the past . . . [and] a retrospective operation will not be given to a statute which interferes with antecedent rights . . . unless such be "the unequivocal and inflexible import of the terms, and the manifest intention of the legislature."

Greene, 376 U.S. at 160 (citations omitted; ellipses and brackets in original); *Laramie Stock Yards*, 231 U.S. at 199.[23]

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[23] Many other decisions of this Court, both before and after *Bradley*, state the principle similarly. See, *e.g.*, *United States* v. *Security Industrial Bank*, 459 U.S. 70, 79 (1982) ("[t]he principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student"); *United States* v. *Magnolia Petroleum Co.*, 276 U.S. 160, 162-163 (1928) ("[s]tatutes are not to be given retroactive effect or construed to change the status of claims

The tension, we submit, is more apparent than real. In *Bradley*, the Court stated two broad limiting principles, the combined effect of which is to enshrine as exceptions to the general rule essentially the same category of statutory changes that were treated as presumptively prospective in *Greene* and like cases. In other words, the canon of construction favoring purely prospective application of new laws was "dropped from the formulation of a general 'rule' concerning retroactivity of intervening statutes, only to reemerge as an important basis for determining when an exception to the general rule should be made." *Litton Systems, Inc.* v. *American Telephone & Telegraph Co.*, No. 83-7744 (2d Cir. Oct. 16, 1984), slip op. 6688.

The first such limiting principle stated in *Bradley* is that any presumption of retroactivity must yield to "statutory direction or legislative history to the

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fixed in accordance with earlier provisions unless the legislative purpose so to do plainly appears" (citing cases)); *United States* v. *St. Louis, S.F. & T. Ry.*, 270 U.S. 1, 3 (1926) ("[t]hat a statute shall not be given retroactive effect unless such construction is required by explicit langauge or by necessary implication is a rule of general application"); *Cameron* v. *United States*, 231 U.S. 710, 720 (1914) ("[i]n the absence of a clearly expressed legislative intent to the contrary the court will presume that the law-making power is acting for the future and does not intend to impair obligations incurred or rights relied upon in the past conduct of men when other legislation was in force"); *United States Fidelity & Guaranty Co.* v. *United States ex rel. Struthers Wells Co.*, 209 U.S. 306, 314 (1908) ("[t]he presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other"); see Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 Minn. L. Rev. 775 (1936).

contrary" (416 U.S. at 711; see *id.* at 715-716 n.21). The Court expressly rejected two extremes—(1) that a statute may be applied retrospectively only where congressional intention to do so is "clear and stated," and (2) that a statute must "always" be applied retrospectively "in the absence of clear legislative direction to the contrary" (416 U.S. at 715). *Bradley* thus stands for the proposition that the retroactivity or prospectivity of a statute should be judged in accordance with the fair import of its language and legislative history, without excessive reliance on presumptions, whether for or against retroactivity.[24] As discussed in the previous section of this brief, the fair import of the language and legislative history of 20 U.S.C. 2732(a)(1) points toward a prospective application of the 1978 changes in school attendance area standards under Title I. Moreover, Congress has expressly directed that repeals and amendments of statutory law are not to be interpreted as releasing or extinguishing liability incurred under prior law, in the absence of explicit provision in the repealing or amending act. 1 U.S.C. 109. See pages 32-33, *supra*.

Bradley's second limiting principle is that the presumption of retroactivity should not be applied where it would result in "manifest injustice." 416 U.S. at 711. The Court interpreted the concept of "manifest injustice" broadly, recognizing the force of the argument against retrospective application in a wide variety of circumstances. For our purposes here, the most significant aspect of the "manifest injustice" inquiry specifically discussed in *Bradley* is that an

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[24] In *Bradley* itself, the Court concluded that, while the legislative history was to some extent "supportive of either position," it provided "at least implicit support for the application of the statute to pending cases." 416 U.S. at 716.

intervening change in law should not be presumed to apply to a pending case if "to do so would infringe upon or deprive a person of a right that had matured or become unconditional" (*id.* at 720).[25] This would seem virtually identical to the Court's formulation in *Greene* and *Laramie Stock Yards*, *i.e.*, that "a retrospective operation will not be given to a statute which interferes with antecedent rights * * *." See also *United States* v. *Security Industrial Bank*, 459 U.S. 70, 79 (1982) (quoting same).[26]

The 1978 revision of Title I attendance area eligibility standards is a classic instance of a change in law that, if applied retroactively, would interfere with antecedent rights and obligations. Respondent's administration of the 1970-72 Title I program ended in 1972; its rights and obligations "had matured or become unconditional" as of that time. The auditors, whose task was to determine whether the federal funds were properly spent, concluded that some $1.1 million was spent in violation of the grant agreement. As this Court held in *Bell* v. *New Jersey*, slip op. 17, the federal government has a substantive

[25] There is no doubt that the rule of construction against retroactivity in these circumstances protects the United States, no less than any other litigant. See *United States* v. *Magnolia Petroleum Co.*, *supra*. Indeed, the general savings statute, 1 U.S.C. 109, expressly preserves liabilities incurred under former statutes. See pages 32-33, *supra*.

[26] The Comptroller General's position that authorization and appropriations legislation must ordinarily be applied prospectively (see page 26 & note 16, *supra*), is a valid generic application of this principle. On grounds both of congressional intent and of principles of federal grant law (see pages 25-26, *supra*), the rights and obligations of the federal government and its grantees mature and become fixed (absent explicit congressional action) at the time of the grants.

"right * * * to recover funds misused by the States." That right matured when the funds were misspent, and should not be defeased because of the fortuity that Congress changed the substantive standards for future grants some six years later, while administrative review processes were still dragging on.[27]

In general outline, then, *Bradley* and *Greene* exemplify not different principles, but application of a comprehensive general principle to different categories of change in statutory law. Whether the issue is viewed under the "manifest injustice" exception of *Bradley* or under *Greene*'s general rule against retroactivity is immaterial. Absent contrary indications of congressional intent, statutory changes in procedures or remedies, and those affecting future rights and obligations, are deemed retroactive in the sense that they apply to pending litigation even when it involves conduct or transactions that took place before the statutory change was enacted. Thus, an attorney's fee statute,[28] revised procedures to be followed before evicting a public housing tenant,[29] and a new process for a citizen to obtain injunctive relief against

[27] The contrast to *Bradley* is striking. The change of law at issue in *Bradley* (passage of an attorneys fees statute) affected "no change in the substantive obligation of the parties" (416 U.S. at 721); it merely redistributed part of the cost of obtaining a remedy. Even as to that, the statute served "merely * * * to create an additional basis or source for the [defendant's] potential obligation to pay attorneys' fees. It [did] not impose an additional or unforeseeable obligation upon the defendant" (*ibid.*).

[28] *Hutto* v. *Finney*, 437 U.S. 678, 694-695 (1978); *Bradley* v. *Richmond School Board*, *supra*.

[29] *Thorpe* v. *Housing Authority*, 393 U.S. 268, 281-283 (1969); cf. *Ziffrin, Inc.* v. *United States*, 318 U.S. 73 (1943) (ICC permit application requirements).

election law violations,[30] to name three recent examples, have all been applied to cases that had their genesis before the governing law was changed. However, statutes are presumed not to alter substantive rights or obligations arising from past conduct or transactions. Thus, bankruptcy laws have been construed not to eliminate property rights, such as liens, that were obtained under prior law,[31] and regulations adding new substantive prerequisites have been construed not to defeat rights to compensation for wrongful discharge under prior law.[32] Presumably this is because of the deeply rooted principle in Anglo-American jurisprudence that it is unjust to apply new substantive legal standards to conduct or transactions that occurred in the past. See Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 Minn. L. Rev. 775 (1936).[33]

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[30] *Cort* v. *Ash*, 422 U.S. 66, 74-77 (1975); cf. *United States* v. *Alabama*, 362 U.S. 602 (1960) (statute authorizing action against a state).

[31] *United States* v. *Security Industrial Bank*, 459 U.S. at 79-81.

[32] *Greene* v. *United States*, *supra*.

[33] The celebrated case of *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), falls into this latter category of cases in which substantive rights under prior law would be impaired by retroactive application of a change in law (there, a treaty with France). Thus, Chief Justice Marshall stated that a court "will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties." *Id.* at 110. There, however, the intervening change in law applied unmistakably to pending cases; especially in light of the great national concerns implicated by the treaty, the Court felt constrained to interpret the treaty not in accordance with the usual presumption against retroactivity, but according to "its manifest import." *Ibid.*

This Court's opinion in *Bell* v. *New Jersey* exemplifies these constraints. The Court held that the forum for administrative review of the audit determinations in this case was altered by the 1978 reauthorization legislation, but only "[t]o the extent that [the 1978 Act] merely changed the forum for assertion of a pre-existing right." Slip op. 8 n.7; see also *id.* at 3-4 n.3, 7 n.6, 18. The Court quoted Justice Holmes' opinion in *Hallowell* v. *Commons*, 239 U.S. 506, 508 (1916), to the effect that "a change of forum 'takes away no substantive right' and *thus* can apply retroactively" (*Bell* v. *New Jersey*, slip op. 3-4 n.3 (emphasis added)). Here, as the remand from this Court to the court of appeals makes clear (*id.* at 7 n.6), the question is what "substantive standards" apply to the 1970-72 expenditures; the court of appeals' retroactive application of "substantive standards" to conduct that occurred years before is thus contrary to the consistent practice of this Court.

The court of appeals nonetheless concluded that the 1978 change in the attendance area eligibility requirements must be presumed to apply retroactively.[34] It found the "presumption of retroactivity [to be] particularly strong" because the 1978 legislation was "remedial" (Pet. App. 4a).

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[34] It is something of a mystery why the court of appeals chose to apply the 1978 standards. By the time this case was briefed before the court of appeals on remand from this Court, the 1978 Act had been superseded by the Education Consolidation and Improvement Act of 1981, 20 U.S.C. 3801 *et seq.*, which, as discussed at pages 7-8, *supra*, again altered the standards. And by the time the case was decided by the court of appeals, the standard had again been amended. Pub. L. No. 98-211, § 2(b), 97 Stat. 1412-1413. See page 8, *supra*. One of the vices of the court of appeals' holding is that the substantive standards to be applied to a supposedly retrospective audit come to depend on mere fortuity.

It is, indeed, frequently stated that "remedial" statutes are to be applied to cases pending at the time of enactment. See, *e.g.*, *Koger* v. *Ball*, 497 F.2d 702, 705-706 (4th Cir. 1974); *Silverlight* v. *Huggins*, 488 F.2d 107, 109 (3d Cir. 1973); *Connett* v. *City of Jerseyville*, 96 F.2d 392, 400 (7th Cir. 1938); cf. *Funkhouser* v. *J.B. Preston Co.*, 290 U.S. 163, 167-168 (1933). But the court of appeals misunderstood this principle. For purposes of retroactivity analysis, a "remedial" statute is one that relates to *remedies* —one that neither enlarges nor impairs substantive rights, but relates to the means and procedures for enforcing those rights. *McGee* v. *International Life Ins. Co.*, 355 U.S. 220, 224 (1957); *Winfree* v. *N. Pac. Ry.*, 227 U.S. 296, 301-302 (1913); 2 C. Sands, *Sutherland's Statutory Construction*, § 41.09, at 280-286 (4th ed. 1973); see also *Bell* v. *New Jersey*, slip op. 3-4 n.3, 7 n.6, 8 n.7.[35] As noted above, this Court has already determined that the issue here involves "the substantive standards" applicable to pre-1978 Title I grants (*id.* at 7 n.6); it has nothing to do with remedies.

The court of appeals also considered it significant that "the case • • • involves a public matter of great national concern and is argued on direct appeal by two public agencies," as opposed to being "the routine private lawsuit in which a retrospective application of a law would disadvantage a private party" (Pet.

[35] *Tcherepnin* v. *Knight*, 389 U.S. 332 (1967), upon which the court of appeals relied (Pet. App. 4a-5a), did not relate to the question of retroactivity. The Securities Exchange Act, at issue there, was "remedial" in the sense that it provided a new substantive remedy for previously inadequately protected interests; the Court simply noted that it should be interpreted to effectuate that remedial purpose. The Court certainly did not suggest that, because the Act was remedial in that sense, it should apply to conduct occurring before it was passed.

App. 5a, citing *Bradley*, 416 U.S. at 716-721). In this regard as well, the court below misinterpreted *Bradley*. The opinion in *Bradley* does not remotely suggest that retroactivity analysis must overlook unfairness to governmental entities or the public. Indeed, the Court expressly noted (*id.* at 720) that an award of attorney's fees would not be unfair to the School Board, which from the outset of the litigation had had a constitutional obligation to provide a nondiscriminatory education and also knew that it faced the possibility that it would be required to pay attorneys' fees (*id.* at 721).

Instead, the Court in *Bradley* was making an affirmative point: that attorney's fees in that context would further the "great national concern" of eradicating racial segregation (416 U.S. at 419), and that the public entity involved, no less than the public at large, stood to benefit from the vindication of constitutional rights (*id.* at 418).

Comparable concerns in the instant case point against retroactive application of the 1978 standards. The "great national concern" implicated in this case is the federal government's ability to ensure that grantees comply with the terms and conditions of their grants. The "two public agencies" involved in this case (Pet. App. 5a) both stand to gain, in the long run, from certainty and predictability in the substantive requirements of federal grants. The government's ability to enforce—and the grantees' incentive to comply with—Congress's decisions regarding the expenditure of Title I funds would be greatly impaired by a decision rendering the terms and conditions of Title I grants subject to subsequent shifts in congressional or administrative policy.

D. Repayment Of Misspent Funds By Respondent Is Necessary For Effective Enforcement Of The Terms And Conditions Of Title I, And Will Not Injure The Interests Of Title I Students In New Jersey

The requirements violated by respondent's program in Newark were designed to ensure that limited Title I funds would be spent only in the neediest areas within each school district. Although the wisdom of the policy reflected in the regulations violated by respondent is subject to honest debate—and indeed that policy was modified by regulation in 1976 and statute in 1978—there is no serious doubt that the regulations were a lawful exercise of the rulemaking authority specifically granted to the Commissioner. 20 U.S.C. (1976 ed.) 241e(a), 242(b). Certainly nothing in the decision below suggests otherwise. Nor is there any doubt that respondent materially violated those regulations. Respondent does not contend otherwise. Nor can there be any claim that selection of eligible attendance areas is a "technical" or insignificant matter that might easily be overlooked. See *Bell* v. *New Jersey*, slip op. 2 (White, J., concurring). The careful attention paid by Congress and the agency to this issue refutes any such suggestion. Designation of eligible areas plays a central role in fulfilling the basic purpose of Title I to concentrate limited resources in areas with high percentages of children from low-income families.[36]

[36] The Comptroller General has designated the grantee's "coverage of services" as one of the most important items for an auditor to examine with respect to conformity to legal and regulatory requirements, noting that "[i]f funds are used to provide services to ineligible recipients * * *, the total amount of the award may have to be returned to the grantor agency." Guidelines for Financial and Compliance Audits of Federally Assisted Programs, 45 Fed. Reg. 21837, 21844 (1980). The Comptroller General is entrusted by statute with the responsibility for establishing principles for federal audits. 31 U.S.C. 3511.

The sole issue here is whether a grant recipient can avoid liability for misspent funds, even though it has failed to fulfill an assurance made when the funds were received and expended, simply on the ground that *subsequent* grants did not require the giving of that assurance. Such a principle would be devastating to the federal government's ability to enforce the terms and conditions of federal grants.

Even where the terms and conditions of grants remain fixed, the auditor's task of determining compliance with all program requirements is massive. The sheer number of programs to be audited, coupled with the profusion of legal rules, both categorical and cross-cutting, makes the auditing process an extremely difficult enterprise. One commentator has noted that "determining whether a grant project has been conducted 'properly' is a very complex undertaking. * * * Not only must the audit team master the intricacies of the [general rules applicable to grants], but it must also master the individual trappings—often unbelievably complicated—of law, regulation, manual, forms, instructions, and practices of each of the hundreds of separate grant programs." R. Cappalli, *Federal Grants and Cooperative Agreements* § 6:01, at 6-3 (1982). This is aggravated by the fact that most auditors are not lawyers.

If, in addition to the other difficulties, the substantive standards applicable to grants are deemed to fluctuate over time, as Congress or the agency adopts a new policy, the audit problems will be magnified many times over. The difficulty is especially acute with regard to a program like Title I, where close congressional and administrative oversight results in

frequent statutory and regulatory changes in the conditions under which grants are made. An audit necessarily assumes that the standards to be applied are fixed—otherwise, there is no way to determine whether the expenditures were proper. As the Education Appeal Board, a body with extensive experience in this area, observed (Pet. App. 48a): "auditors could not conduct an effective audit if the grantees were permitted, years after the funds had been spent, to use new methods for computing attendance area eligibility."

Retroactive changes in program standards would sow other seeds of confusion as well. The records and data needed to evaluate compliance under a different standard than that prescribed at the time might not be available.[37] The uncertainty caused by the court of appeals' rule may thus have a tendency to stimulate unnecessary record creation and retention. Under the court of appeals' approach, parties might gain an interest in delaying audit review proceedings, in the hope that a more favorable standard might be adopted. Different standards would apply to different grantees, depending on when their appeal was ultimately settled—with all the attendant injustice

[37] This case is a prime example. The court of appeals directed the Secretary to determine whether respondent satisfied the requirements of the 1978 Act for each disputed attendance area, but there is no assurance that the records necessary to make that determination for 1970-72 are still available, or indeed were ever collected. Under regulations in effect at the time, Title I expenditure records were not required to be maintained beyond five years unless they were involved in an audit; there was no requirement that a state even compile expenditure records of the kind necessary for a determination of compliance with the new standard (20 U.S.C. 2732(a)(1)). 45 C.F.R. 116.54 (1972). Accord, 34 C.F.R. 200.56 (Chapter 1 recordkeeping requirement).

and claims for relief that such disparate treatment would generate. The simple need for fairness and finality thus argues strongly against the result below.

The House of Representatives has recently considered, and rejected, a provision in a committee bill that would have required application of "current law" in all Title I audit cases. Representative Ford explained the case against the proposal. His reasoning applies equally to the decision below. 130 Cong. Rec. H7814 (daily ed. July 25, 1984):

> Such a standard would violate the basic principle that grantees should be held accountable for the expenditures of funds under the law as it was when they received the funds. A current law standard would treat differently grantees who received funds at the same time. Depending on when they were audited, grantees would be held to different program requirements based upon the state of the law when they were audited. A grant might be made on the basis of one set of standards, an audit conducted on a second, an administrative appeal heard on a third, and judicial review sought on a fourth.

If changes in statutory or regulatory standards were to impose more stringent—or simply different—conditions on the grant recipients than those to which they agreed to conform when they received and expended the funds, it is clear that the failure to comply with the subsequent conditions, no matter how desirable they might be as a matter of policy, would be no ground for demanding the recoupment of funds that were properly expended under the conditions applicable at the time the expenditures were made. See *Pennhurst*, 451 U.S. at 24. The result should be

no different when the subsequent conditions are less, rather than more, stringent. The propriety of the expenditures depends on the standards in effect when they were made, not on those subsequently enacted for later grants.

The court of appeals' apparent reluctance to permit the Secretary to invoke the recoupment remedy in these circumstances flies in the face of the clear congressional intention, reviewed by this Court in *Bell* v. *New Jersey*, slip op. 8-16, that the Department recapture misspent funds. Indeed, Congress made the agency's agreement to undertake actions to recapture misspent funds "an essential condition for enacting the proposed legislation." 111 Cong. Rec. 7690 (1965), quoted at *Bell*, slip op. 9. There is no need to reiterate that history here. It suffices to say that the court of appeals apparently substituted its own view of salutary public policy for that of Congress.

It should be noted that the cost of a repayment order does not fall on the schoolchildren served by Title I. Rather, the liability runs against the grantee, which has the obligation to repay the misspent funds *and* to maintain the full level of Title I programs. *Bell*, slip op. 9 n.8. Moreover, even with respect to the state grantees, Congress has mitigated the harshness of the remedy. It has authorized the Secretary to return to the states up to 75% of repaid funds where the practices that led to the misuse have been corrected (as here), and where the returned funds will, to the extent possible, be used to benefit the population affected by the misuse and will serve to achieve the purposes of the state Title I program. 20 U.S.C. 1234e(a).[38] This approach, established by

[38] This grantback authority has been exercised by the Secretary on numerous occasions. See, *e.g.*, 49 Fed. Reg. 34886-34887 (1984) (Rhode Island); 49 Fed. Reg. 13899-13900 (1984) (West Virginia); 49 Fed. Reg. 8474-8476 (1984) (South Carolina); 47 Fed. Reg. 20343-20345 (1982) (Wisconsin); 47 Fed. Reg. 23002-23003 (1982) (District of Columbia).

law, is the appropriate means for addressing any perceived harshness in the treatment of respondent here. The court of appeals seriously erred in attempting to achieve the same objective by making a disruptive and unwarranted change in the law applicable to federal grants.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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